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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-839

PAUL P. ERLENBAUGH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 452 F. 2d 967.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1971. A petition for a writ of certiorari was filed on December 27, 1971, and was granted on March 6, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

This Court granted certiorari limited to the following question presented by the petition: "Whether the

Court of Appeals erred in not following the opinion of the Court of Appeals for the Fourth Circuit in a 1967 case entitled *United States* v. *Arnold,* 380 F. 2d 366, thus creating a conflict between the circuits."

The question, in more concrete form, is whether petitioners' use of an interstate railroad to transport scratch sheets for use in their illegal gambling operations violated 18 U.S.C. 1952.

STATUTES INVOLVED

18 U.S.C. 1952 provides in part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any lawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in sub-paragraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act) or prostitution offenses in violation of the laws of the State in which they are committed or of the

United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States. * * *

18 U.S.C. 1953 provides in part:

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication. * * *

18 U.S.C. 1084 provides in part:

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communi-

cation which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.* * *

STATEMENT

After jury trials on five separate indictments in the United States District Court for the Northern District of Indiana, the petitioners were convicted for the use of facilities of interstate commerce to facilitate bookmaking operations illegal under state law, in violation of 18 U.S.C. 1952, and conspiracy to commit that offense, in violation of 18 U.S.C. 371. The court of appeals consolidated the cases and affirmed each of the convictions, 452 F. 2d 967 (C.A. 7).

The facts are essentially the same in all the cases. In each the interstate facility which petitioners caused to be used was the railroad, and the item transported was the *Illinois Sports News,* a "scratch sheet," which was shown to be significant to the daily conduct of petitioners' illegal gambling businesses. Since the pertinent facts in the five cases are identical, the facts of

only one case (Erlenbaugh) are set forth in detail, as illustrative.

The evidence at the Erlenbaugh trial showed that between August 13 and October 29, 1968, the Hammond News Agency, a newspaper distributor in Hammond, Indiana, ordered ninety copies daily of the *Illinois Sports News* from the publisher (Tr. 90, 98, 113–114). The *Illinois Sports News,* which is printed in Chicago six days each week and sells for 35¢ at retail, is a horse racing publication of the type known as a "scratch sheet" [1] (Tr. 91, 97–98, 101–102, 291). It features horse racing information more complete and current than that available in Chicago's regular daily newspapers (Tr. 103).

Every morning except Sundays during the period of the indictment a messenger from the publisher delivered a brown manila envelope containing about ninety copies of the *Illinois Sports News* to Randolph Station in Chicago, where a porter placed it on the 8:30 a.m. train of the Chicago, South Shore, and South Bend Railroad, which arrived in Hammond, Indiana, at 9:02 a.m. (Tr. 90–92). When the train reached Hammond, another porter took the envelope from the conductor and placed it in the baggage room of the Hammond station (Tr. 277).

George Frost, an employee of the Hammond News Agency, testified that when he arrived at the Ham-

[1] A "scratch" is a horse that is withdrawn from a race in which it is entered. Information concerning scratches is of great interest to bettors, since withdrawal of a good horse alters the odds in a race (Tr. 101).

mond station at 10:00 a.m. each morning to pick up the manila envelope it regularly contained only about thirty copies of the *Illinois Soprts News* as well as two small envelopes of money (Tr. 113–116, 138–139). Frost testified that one Ray Goodman was the only person specifically authorized by the Hammond News Agency to remove scratch sheets from the envelope before Frost came for it. Goodman took twenty-two copies each day and was billed for them weekly by the Hammond News Agency (Tr. 127, 132). The money in the two small envelopes which Frost found each morning totalled 35¢ (the retail price) times the number of scratch sheets missing, other than those taken by Goodman. (Tr. 125.)

Frost delivered the remaining 30 scratch sheets to three customers, who were billed for them by the Hammond News Agency: Alexander Book Store, Friendly Billiards and Sibley Newsstand. Frost also delivered the money in the two envelopes to the Sibley Newsstand, which was billed by the Hammond News Agency both for the scratch sheets it actually received and the copies represented by the money in the envelopes (Tr. 117–118, 128).

Petitioner Hintz was seen to arrive at the Hammond station shortly after 9:00 a.m. on many days. He would go to the baggage room, where he and other persons would take copies of the *Illinois Sports News* from the manila envelope which had just arrived on the train from Chicago (Tr. 272–281). Hintz then took scratch sheets to 103 State Street, in Hammond (Tr. 150–154).

Petitioner Erlenbaugh conducted a bookmaking operation at 103 State Street in an establishment known as Paul's Smoke Shop (Tr. 147). Bettors would take the scratch sheets as soon as they arrived and use them to make their gambles (Tr. 154). Erlenbaugh told federal agents, during their execution of a search warrant of the premises, that he had been making book in Hammond for thirty-five years and had three persons—including petitioner Mitchell—working for him (Tr. 186, 216).

It was shown that the number of copies of the *Illinois Sports News* ordered by the Hammond News Agency declined sharply after this and other bookmaking operations in Hammond were closed by law enforcement authorities (Tr. 121).

The four other cases differed only in the identity of the participants in the illegal gambling operation, the location of the betting parlor and the precise manner in which copies of the *Illinois Sports News* were picked up daily at the Hammond railroad station (See Pet. App. 3–5).

SUMMARY OF ARGUMENT

Section 1952 of Title 18 U.S.C., under which petitioners were convicted, forbids the use of any interstate facilities to promote or facilitate illegal gambling. If the interstate facility is used for that purpose, the statute is violated, regardless of the particular kind of item that is transported or sent. Petitioners contend that there is an implied exception in

Section 1952 when an interstate facility is used to transport newspapers in aid of illegal bookmaking operations, since 18 U.S.C. 1953, which prohibits the interstate transportation of enumerated items of gambling paraphernalia, explicitly excludes from coverage "any newspaper or similar publication." But this contention disregards the absence of any such exclusion in Section 1952 and the substantial legislative reasons for creating an exclusion in Section 1953 that are not applicable to Section 1952.

Section 1953 forbids the interstate transportation of gambling paraphernalia. Unlike Section 1952, while it contains no requirement that the transportation be done to promote an unlawful purpose, it avoids coverage of innocent activities through various exceptions to its list of gambling paraphernalia. Section 1952 has a different approach: it forbids the use of any facility of interstate commerce to promote any of several "unlawful activities," including illegal gambling. Since the scope of the statute is confined by its requirement of a criminal purpose, it contains no exceptions as to the kinds of items whose transportation may violate the section.

An examination of the case law and legislative history of Sections 1952 and 1953 further establishes what is evident from their language and respective purposes: that the exception created for newspapers under Section 1953 does not create an immunity under Section 1952 for those who cause scratch sheets to be transported interstate in aid of illegal gambling operations.

ARGUMENT

PETITIONERS' USE OF AN INTERSTATE RAILROAD TO TRANSPORT SCRATCH SHEETS FOR USE IN THEIR ILLEGAL GAMBLING OPERATIONS VIOLATED 18 U.S.C. 1952

Petitioners were charged here with violating, and conspiring to violate, 18 U.S.C. 1952, by causing the use of an interstate facility to obtain copies of the *Illinois Sports News* to promote their illegal gambling activities. Petitioners do not dispute that their gambling operations, which were illegal under Indiana law,[2] constituted "unlawful activity" as defined in Section 1952(b). Similarly it is clear that petitioner's arrangement for the prompt daily arrival of the *Illinois Sports News*—which was important to their businesses—caused the use of an interstate facility, *i.e.*, the railroad, and "promoted" those illegal activities within the meaning of Section 1952(a)(3). Petitioners' sole contention here (in view of this Court's limited grant of certiorari) is that, because the item obtained through an interstate facility was a "newspaper or similar publication" within 18 U.S.C. 1953(b)(3),[3] it follows that petitioners could not be convicted under Section 1952.

Sections 1952 and 1953 were enacted in 1961 as parts of Attorney General Kennedy's legislative program to combat organized crime. Section 1953 forbids inter-

[2] See Burns Indiana Statutes (1956 Replacement) Sections 10-2304, 2307, 2311, and 2331.

[3] The government concedes that the *Illinois Sports News* is a newspaper under 18 U.S.C. 1953(b)(3). See *United States* v. *Kelly*, 328 F. 2d 227, 236-237 (C.A. 6); *United States* v. *Kish*, 303 F. Supp. 1212, 1213 (N.D. Ind.); *United States* v. *Azar*, 243 F. Supp. 345, 346-347 (E.D. Mich.).

state transportation of gambling paraphernalia. It does not require an intent to promote, or subsequent acts in furtherance of, an illegal enterprise, and, unlike Section 1952, it contains various exemptions. Section 1953 exempts common carriers acting in the usual course of their business (1953(a)) and does not apply to transportation of gambling paraphernalia to be used in wagering which is legal under state law (1953 (b)(1) and (2)). In addition there is a specific exemption for "the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication" (1953(b)(3)). Since Section 1953 lists certain inherently suspect gambling items and forbids their interstate transportation, the exceptions are necessary to prevent the broad generic language of the statute from being read to make contraband items that might be used either innocently or in aid of illegal gambling, such as newspapers with extensive racing information.

Section 1952 is quite different in approach and scope. It makes it a federal offense to use any interstate facility—including the mails—or to travel in interstate commerce with intent to promote an "unlawful activity," if thereafter an act is peformed in furtherance of the unlawful activity (1952(a)). "Unlawful activity" is defined, *inter alia,* as any business enterprise illegal under state or federal law which involves gambling, narcotics, prostitution, or liquor on which the federal excise tax has not been paid (1952 (b)(1)). Since a criminal purpose is an essential element under Section 1952, it is not applicable to innocent activities, and the statute, therefore, contains no

exceptions as to kinds of facilities used, or items transported, such as are found in Section 1953.

Thus, Congress understandably excluded newspapers from its list of gambling paraphernalia whose interstate transportation it made illegal, but had no corresponding intent to exempt from the coverage of Section 1952 those persons who use an interstate facility to obtain a newspaper or any other thing innocent in itself in order to promote an illegal gambling business. In the later case it is the carrying on of the illegal business with the aid of interstate facilities, not the transportation of the thing, which is the gist of the criminal charge. This reading of the legislative purpose is manifested not only by the absence in Section 1952 of any exemption for newspapers corresponding to the exemption in Section 1953; it is also borne out by the legislative history of those enactments, to which we now turn.

A. THE LEGISLATIVE HISTORY OF SECTIONS 1952 AND 1953 SHOWS THAT THERE WAS NO INTENT TO EXEMPT FROM SECTION 1952 PERSONS WHO TRANSPORT "A NEWSPAPER" BY INTERSTATE FACILITIES TO PROMOTE UNLAWFUL ACTIVITIES.

1. Eighteen U.S.C. 1952 (S. 1653), as originally introduced in the Senate, proscribed only travel in interstate or foreign commerce to promote unlawful activities. The Attorney General testified before the Senate Judiciary Committee that the purpose of the bill was to aid local law enforcement officials by impeding the travel of persons engaged in certain illegal enterprises. See Hearings on S. 1653–1658 and S. 1665 before the Senate Judiciary Committee on the At-

torney General's Program to Curb Organized Crime and Racketeering, 87th Cong., 1st Sess. (1961), at 15–17. According to the Attorney General, the legislation was primarily designed to be of "material assistance to the States in combatting pernicious undertakings which cross State lines." S. Rep. No. 644, 87th Cong., 1st Sess. (1961), at 4. See *United States* v. *Nardello,* 393 U.S. 286, 290–292.

As passed by the Senate, 18 U.S.C. 1952 contained an amendment offered in committee by Senator Keating which greatly broadened the bill by making it a federal offense to use any facility in interstate or foreign commerce—including the mails—to promote the specified unlawful activities. See S. Rep. No. 644, *supra,* at 4. The substance of this Senate amendment was incorporated in the House version of the bill (see H. Rep. No. 966, 87th Cong., 1st Sess. (1961) at 1), which was recommended by a conference committee (see H. Rep. No. 1161, 87th Cong., 1st Sess. (1961) at 1) and enacted into law.

Chairman Eastland of the Senate Judiciary Committee, who introduced 18 U.S.C. 1952 (as well as 18 U.S.C. 1084 and 1953) on the recommendation of the Attorney General, summarized the objectives of the statute in remarks on the Senate floor, as follows (107 Cong. Rec. 13943):

> The bill is designed to bolster local law enforcement by denying interstate facilities to persons engaged in illegal gambling, liquor, narcotics, or prostitution business enterprises or extortion or bri-

> bery in violation of the laws of the State in which committed or of the United States. The committee has received testimony that the complex operations of today's organized criminal syndicates recognize no State boundary. S. 1653 is intended to disrupt the interstate operation of these criminal organizations by making it impossible for organized gambling and other illegal activities to operate on an interstate scale beyond the reach of local enforcement agencies.

See also H. Rep. No. 966, *supra*, at 3 for a similar analysis of the purposes of the legislation.

2. Unlike 18 U.S.C. 1952, which forbade interstate travel, or use of interstate facilities, for a variety of "unlawful activities," including gambling, 18 U.S.C. 1953 (S. 1657) focused more narrowly on gambling paraphernalia alone. Congressman Celler, who introduced H.R. 6571, the House version of S. 1657, explained the bill as follows (107 Cong. Rec. 16537):

> The primary purpose is to prevent the transportation in interstate commerce of wagering material. The purpose actually is to cutoff and shutoff gambling supplies, in reality to prevent these lotteries and kindred illegal diversions.

See also S. Rep. No. 589, 87th Cong. 1st Sess. (1961); 107 Cong. Rec. 13902–13903 (remarks of Senator Eastland).

As originally introduced in the Senate, 18 U.S.C. 1953 proscribed any knowing transportation of wagering paraphernalia in interstate or foreign commerce

and excepted only common carriers operating in the usual course of business. The exemptions for paraphernalia to be used in gambling which is legal under state law (1953(b)(1) and (2)) and for newspapers and similar publications (1953(b)(3)) were added by amendments adopted by the Senate Judiciary Committee. S. Rep. No. 589, *supra,* at 1.

The Senate Judiciary Committee report on Section 1953 included an explanation of the purpose of the amendment exempting newspapers (S. Rep. No. 589, *supra* at 2):

> The committee * * * felt that the bill, as introduced, might be so interpreted as to bring within its criminal penalties a person who carried a newspaper or other publication containing racing results or predictions. In order clearly to prevent such an interpretation the committee has excluded the carrying or transporting into interstate or foreign commerce of any newspaper or similar publication from the provisions of the bill.

Senator Keating, who proposed the newspaper amendment in committee, stated in explanation on the Senate floor (107 Cong. Rec. 13902):

> * * * the press will be interested in knowing that under the amendment which has been offered by the committee, anyone who carried a *New York Times* or *Washington Post* or any other newspaper under his arm will not be liable to prosecution as he might have been under the bill as originally introduced.

> As originally worded the bill could have been construed to prohibit the interstate transportation of any newspaper which contained information useful in the numbers game. The amendment which I proposed in committee expressly excludes "newspapers and similar publications." This makes it absolutely certain that the bill will not infringe in any manner on the freedom of the press guaranteed by the first amendment. * * *

3. The legislative history of these two sections reveals that Congress was invoking its commerce power in each to attack organized crime in different ways. Section 1952 was a broad attack on organized criminal activities, designed to deny such activities the use of any and all facilities of interstate commerce. The only limitations on its scope were (1) its requirement that the facility be used to promote an unlawful activity; (2) its definition of "unlawful activities"; and (3) its requirement that after the use of such facilities some overt act be made in furtherance of the unlawful activity.

Section 1953, on the other hand focused narrowly on one specific type of conduct related to interstate gambling operations, transporting wagering paraphernalia interstate. Because such conduct is so closely associated with illicit gambling, Congress declared it illegal *per se*; the enactment, unlike 18 U.S.C. 1952, contained no requirement of intent to promote an illicit enterprise. To preclude the possibility that the

broad prohibitions of Section 1953 might punish legitimate activities, Congress found it necessary to write various exemptions into the statute.[4]

The legislative history of Section 1953 shows that the exemption for newspapers and similar publications in subsection (b)(3) had two purposes: (1) to avoid punishing citizens who innocently transport publications containing wagering information; and (2) to bar any conflict with the right of periodicals to publish and circulate, as guaranteed by the First Amendment.

Neither purpose of the Section 1953(b)(3) newspaper exemption would be served by overturning petitioners' convictions under 18 U.S.C. 1952. Petitioners are persons who engaged in gambling enterprises in violation of state law—not the innocent citizens Congress desired to immunize from prosecution when they happen to transport wagering paraphernalia across state lines. Furthermore, the right of the *Illinois Sports News* to publish and circulate is not impaired by petitioners' convictions. Nor does the application generally of Section 1952 to the operators of illicit gambling businesses who use interstate facil-

[4] 18 U.S.C. 1084 is similarly structured. It focused on a specific type of conduct related to interstate gambling, the interstate transmission by wire of wagering information by persons in the betting business, and made it illegal *per se*, without requiring a showing of intent to promote an illegal activity. Like Section 1953, and for the same reasons, its language was limited by exceptions designed to prevent application of the statute to innocent activities: Section 1084 does not apply to information transmitted for use in news reports of sporting events or to wagering information transmitted for use in betting which is legal under state law (1084(b)).

ities to transport scratch sheets or other kinds of newpapers for their gambling enterprises infringe upon the First Amendment right of the newspaper to publish and circulate. Conviction of such persons under Section 1952 does not imply the illegality of the scratch sheet itself or that it may not be sent in interstate commerce. Legitimate subscribers to the publication—including the wagering public—are plainly not within the reach of 18 U.S.C. 1952 and are not prevented from purchasing or transporting the publications.

B. THE REASONED CASE LAW UNIFORMLY HOLDS THAT THE OTHERWISE INNOCENT USE OF INTERSTATE FACILITIES VIOLATES SECTION 1952, IF THAT USE PROMOTES AN UNLAWFUL ACTIVITY.

As we have shown, a principal purpose of Section 1952 is to assist local law enforcement by subjecting to federal prosecution persons who use interstate facilities to further certain enterprises that violate state law. The use of an interstate facility raises the likelihood that the scope of the criminal activity may preclude adequate policing by local authorities and provides a basis for federal jurisdiction; the gravamen of the offense remains the illicit activity itself. See *United States* v. *Miller,* 379 F. 2d 483, 487 (C.A. 7), certiorari denied, 389 U.S. 930. It follows that use of the interstate facility need not in itself be illegal. See *United States* v. *Azar, supra,* 243 F. Supp. at 350.

In numerous cases brought under Section 1952 the use of the interstate facility has been innocuous in itself; the violation has arisen because that otherwise innocent use has promoted an activity illegal under state (or federal) law. For example, in *Menendez* v.

United States, 393 F. 2d 312 (C.A. 5), certiorari denied, 393 U.S. 1029, the defendant was convicted under Section 1952 of having used a facility of interstate commerce, the long distance telephone, to promote a lottery operated in violation of Florida law. The winning lottery number was based upon the combined liabilities of the 12 Federal Reserve Banks, a figure released by the Federal Reserve Bank of New York on Thursdays at 4:00 p.m. Every Thursday the defendant, from Florida, telephoned the Federal Reserve in New York and obtained the necessary figure. Defendant's weekly telephone call, harmless in itself, satisfied the jurisdictional requirement in Section 1952 and subjected him to federal prosecution for his gambling operation which violated state law. Similarly, the courts have upheld convictions under 18 U.S.C. 1952 involving such *per se* innocent acts as sending Western Union money orders,[5] receiving racing results on a Western Union ticker tape,[6] or depositing checks for collection[7]—when they were performed in furtherance of the unlawful activities specified in Section 1952 (b). In *United States* v. *Ross*, 374 F. 2d 227 (C.A. 6), vacated on other grounds, 390 U.S. 204, the court specifically held that causing sports newspapers to be mailed in furtherance of an illicit gambling operation violated Section 1952. 374 F. 2d at 230.

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[5] *United States* v. *Ruthstein*, 414 F. 2d 1079 (C.A. 7); *United States* v. *Wingo*, 394 F. 2d 484 (C.A. 6); *United States* v. *Hawthorne*, 356 F. 2d 740 (C.A. 4).

[6] *United States* v. *Miller*, *supra*.

[7] *United States* v. *Wechsler*, 392 F. 2d 344 (C.A. 4), certiorari denied, 392 U.S. 932; *United States* v. *Barnes*, 383 F. 2d 287 (C.A. 6).

The present cases cannot rationally be distinguished from the many cases where the otherwise innocent use of interstate facilities has been held to violate Section 1952, when that use has served an illicit purpose. Petitioners' use of an interstate railroad to transport the *Illinois Sports News* would have been lawful in ordinary circumstances; it violated Section 1952 only because the scratch sheets were intended by petitioners to further, and were subsequently used by them in, their illegal gambling operations. From the viewpoint of the proscription of Section 1952, the substance of the transaction would have been the same if, instead of receiving physical copies of the scratch sheets, petitioners had been telephoned the information daily by a cohort. Such a use of the interstate telephone lines would clearly violate Section 1952. See, *e.g., Menendez* v. *United States, supra.* Nor do the petitioners' convictions under Section 1952 in any way imply the illegality, or chill the publication, of the *Illinois Sports News,* any more than the defendant's conviction in *United States* v. *Miller, supra,* prohibited Western Union from broadcasting baseball scores on its tickertape.

We submit that *United States* v. *Arnold,* 380 F. 2d 366 (C.A. 4), relied on by petitioners, was wrongly decided. In *Arnold,* the defendant made an interstate telephone call to order *Football Forecasts,* a weekly publication which was subsequently sent to him through the mails and which he used in an illegal gambling operation. The indictment charged both that *Football Forecasts* was wagering paraphernalia which defendant caused to be sent in interstate com-

merce in violation of 18 U.S.C. 1953 and that his initial interstate telephone call to order the paper constituted use of a facility in interstate commerce with intent to promote his illicit bookmaking business in violation of 18 U.S.C. 1952. He was convicted under both counts. In a short *per curiam* opinion, the Fourth Circuit properly reversed the conviction under Section 1953 on the ground that, since *Football Forecasts* was a newspaper, its transportation was exempt under Section 1953(b)(3). 380 F. 2d at 367-368. Without any further discussion, however, the court also reversed the defendant's Section 1952 conviction, saying (380 F. 2d at 368):

> If Forecasts is not within the ban of § 1953, then the use of the telephone to order its transmittal through the mail is not the use of a "facility * * * to * * * promote * * * any unlawful activity", as contemplated by the contemporaneously enacted § 1952.

The Fourth Circuit in *Arnold* cited no authority for its holding and did not take note of the contrary ruling in *United States* v. *Ross,* 374 F. 2d 227 (C.A. 6), affirming a conviction under 18 U.S.C. 1952 in which the mailing of a sports newspaper was the basis for federal jurisdiction. Likewise, the *Arnold* court overlooked its own decision in *United States* v. *Hawthorne, supra,* 356 F. 2d 740 (C.A. 4), certiorari denied, 384 U.S. 908, which adopted the general rationale we urge here, that the use of an interstate facility under 18 U.S.C. 1952 need not itself involve any illegal act. The court of appeals below characterized the holding of *Arnold* as a "bald conclusion" and

a "non sequitur" and declined to follow it in light of the "lack of any precedent or reasoning" therein. 452 F. 2d at 973. Moreover, the charge in *Arnold* was based specifically on the placing of the telephone call, not on the use of the interstate facility in obtaining newspapers which were used in the illegal enterprise. Though we think the decision in *Arnold* was wrong, the issue there was a stage more remote from that presented here, which involves the interstate transportation of an item which was directly utilized in the gambling enterprise.

In our view the decision below was correct. It is the use to which the newspaper was put, not the contents or the carrying of the newspaper, which places the stamp of illegality on the conduct here. An innocent object may be the instrumentality of a crime when used in a wrongful way. It is that use which Section 1952 proscribes.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court of appeals below should be affirmed.

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